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83-865

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HARRY CANNON,

Petitioner

-Against-

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the District Court's use of Federal Rules of Evidence, Rule 609(b), to limit petitioner's impeachment of the government's principal witness against him, impermissibly infringed upon petitioner's Sixth Amendment Right of Confrontation; whether the Seventh Circuit Court of Appeals properly ignored petitioner's Sixth Amendment objections to the District Court's limitation.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, A.D. 1983

HARRY CANNON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

HARRY CANNON, Petitioner, by his attorneys, ELLIOTT MUSE,JR. and JAMES D. MONTGOMERY, JR., Petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review a judgment of that court entered August 29, 1983, which became final September 26, 1983, on denial of a petition for rehearing, which judgment affirmed Petitioner's conviction under 28 U.S.C. secs. 846 and 848.

This petition is due to be filed on or before Novem-

ber 25, 1983.

OPINIONS BELOW

United States of America v. Charles W. Wilson, et al., No. 81-1870, et. al., Slip Op. (7th Cir. 8/19/83) (Appendix A).

United States of America v. Harry Cannon, Nos. 81-2072, 81-2508, Slip Op. (7th Cir. 8/29/83), reh. den. 9/26/83 (Appendix B)

JURISDICTION

This petition seeks review of the judgment of the Court of Appeals for the Seventh Circuit pertaining to Appeal No. 81-2508, only. The Court of Appeals affirmed the judgment of the District Court on August 29, 1983. The District Court's judgment of guilty, upon the jury's verdict was entered on July 7, 1981. Petition for Rehearing and for Rehearing En Banc was denied by the Court of Appeals for the Seventh Circuit on September 26, 1983. Jurisdiction is conferred upon this Court to review the judgment below by Writ of Certiorari, pursuant to 28 U.S.C., Sec. 1254(a).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES OF EVIDENCE INVOLVED

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been previously ascertained by law, and to be informed

of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Federal Rules of Evidence 609 (a)(b)

Rule 609 of the Federal Rules of Evidence states in Pertinent part:

Rule 609. Impeachment by Evidence of Conviction of Crime:

(a). General Rule - For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime was (1) punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b). Time Limit - Evidence of a conviction under this Rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

STATEMENT OF THE CASE

Petitioner, Harry Cannon was one of eleven persons charged in a seven-count Indictment, filed on October 21, 1980, by the Special November, 1978 Grand Jury. The Indictment charged the peritioner, Harry Cannon and co-defendant, Charles W. Wilson, under 28 U.S.C., Sec. 848, with engaging in a continuing criminal enterprise

from July, 1976 to October, 1980 and with conspiring with the other nine indictees to possess and distribute heroin and cocaine in violation of 28 U.S.C., Sec. 848.

Ten of the indictees, including petitioner herein, were tried by jury in the District Court during February and March, 1981. On March 31, 1981, the jury returned a verdict finding nine of the ten defendants guilty as charged. As to pertitioner, Harry Cannon, who was charged in Count I and Count II of the Indictment, the jury could not agree on a verdict and the District Court judge declared a mistrial, sua sponte. Petitioner was retried on July 7, 1981, and on July 14, 1981, the jury returned a verdict of guilty against petitioner as to both counts. Judgment was entered on the jury verdict on the same day.

Prior to the first trial, Howard Love, the eleventh indictee, pled guilty to the conspiracy charged against him in Count II of the Indictment. He became the principle government witness against petitioner and the other nine defendants in the first trial, and against petitioner in th second trial. As part of his plea agreement, Love agreed to testify on behalf of the government, and the government agreed to make no specific recommendation to the Court regarding sentencing and to make the extent of his cooperation known to the sentencing judge.

Prior to petitioner's first trial, the government provided defense counsel with a three page "rap-sheet" of Howard Love's convictions, which indicated that Love had been incarcerated from 1953 to February, 1957 for robbery; from June 1958 to May 4, 1965 for three armed robberies and a plain robbery; from May 4, 1965 to September 13, 1970 for armed robbery; had been convicted in May, 1971 for armed robbery while on probation for the last offense, and in 1978 for one sale of narcotics. Additionally, in May 1948 Love had been convicted of larceny while in the Armed Services and was sentenced to five years. This sentence was reduced to one year in exchange for his informing the authorities of another person's escape plan. The totality of these convictions resulted in nearly 19 years imprisonment for Love.

During the first and second trials, petitioner sought to use Love's prior convictions to impeach his motive and bias for testifying against petitioner; in particular, petitioner sought to use the fact and circumstance of Love's 1948 conviction to show that Love had a past experience of cooperation with law enforcement authorities, and that experience taught him that such cooperation is rewarded by the government. Thus, contrary to his testimony to the jury concerning his plea agreement with the

government, the petitioner sought to show that Love had more than a mere "hope" that the government would "help" him out in exchange for favorable testimony. Love rather expected that the government would help him and that this knowledge and expectation was a motivating factor in his decision to testify.

Petitioner also sought to use the total of the nearly 19 years Love spent in the penitentiary as bearing on the strength and urgency of his motivation for testifying-that he faced an aggravated sentencing as a result of his extensive criminal background and that he had great interest to stay out of the penitentiary.

During the first trial, the District Court allowed defense examination into Love's 1965, 1971, 1978 and 1980 convictions for purposes of impeachment. These convictions showed a total of only six years and four months which Love spent in the penitentiary. The District Court precluded use of the 1948, 1953 and 1958 convictions under Federal Rules of Evidence, 609(b), notwithstanding petitioner's arguments that such limitations under the circumstances of this case violated his Sixth Amdendment Confrontation rights.

In connection with the defense's intended impeachment of Love, the defense made the following oral offer of proof during the first trial: that Love understood, based upon his experience, that when he helped the government out, the government hepled him out, and that he expected help from the government in giving testimony at trial; vior dire also revealed that he knew and understood that cooperating with the government he stood a chance of reducing or eliminating any imprisonment, and that part of the reason he testified was to avoid going back to prison where he had spent 19 years of his life.

During his second trial, petitioner renewed his objections to the District Court's limiting Love's impeachment by precluding use of his pre-1965 convictions. The Court permitted his offer of proof in the first trial to stand in the second trial, but overruled petitioner's objections.

On appeal, petitioner argued that the District Court's limitation on Love's impeachment under Rule 609(b), violated his Sixth Amendment rights to confront the witnesses against him. Davis v. Alaska, 415 U.S. 308 (1974). The Court of Appeals affirmed the propriety of the District Court's limitation of Love's impeachment under Federal

Rules of Evidence, Rule 609(b), without addressing petitioner's constitutional objections. 1/

1/ In its Opinion, United States v. Cannon, Nos. 81-2072 and 81-2508, Clip Op. at p. 10 (7th Cir. 8/29/83), the Court of Appeals referenced its Opinion on the issue of Love's impeachment to its discussion in the Opinion of United States v. Wilson, etal., No. 81-1870, etal., Slip Op. at 15-16 (7th Cir. 8/19/83). (App. pp. 1, 18).

ARGUMENT

The petitioner seeks review of the propriety of the Court of Appeals to affirm, under Rule 609(b), the District Court's limitation on the defense's impeachment of the government's principal witness against petitioner,[2] without taking cognizance of petitioner's Sixth Amendment Confrontation Rights as espoused in Davis v. Alaska, 415 U. S. 308 (1974).

The Opinion of the Seventh Circuit Court of Appeals in United States v. Harry Cannon, Nos. 81-2072, 81-2508, Slip Op. (7th Cir. 8/29/83) ignored this petitioner's constitutional objections to the District Court's refusal to allow impeachment of the government's star witness, Howard Love, through admission of Love's past experience of cooperation with the government in exchange for leniency relating to his 1948 conviction, and through exposure of the total 19 years Love spent in the penitentiary. (D. Br. pp. 36-40, Rep. Br. pp. 8-15). Rather, the Court merely referenced its Opinion on the issue to its discussion of the companion case of United States v. Wilson, etal., No. 81-1870, etal., Slip Op. at 15-61 (7th Cir. 8/19/83); Cannon, Slip Op. at 10.[3]

2/At the second trial, Love was the sole witness to testify as to petitioner's narcotics activities as charged under the Indictment.

3/The Wilson Appellants' Brief failed to focus on the Sixth Amendment as was the case in the Cannon Appellant's Brief.

In its Opinion, this Court rejected petitioner's claims concerning the District Court's limitation of Love's impeachment through use of his pre-1965 convictions, as meritless. Wilson, at 15-16, Cannon at 10. The Wilson Opinion affirmed the propriety of the District Court's limitation under Federal Rules of Evidence 609(b),without addressing whether the District Court violated Cannon's Sixth Amendment right of confrontation when it precluded inquiry into Love's "specific" motive 4/ for testifying falsely for the government.

The Seventh Circuit's failure to address the Sixth Amendment issue that a presumably proper limitation on impeachment under Rule 609(b) necessarily satisfies the right of confronation guaranteed by the Sixth Amendment. However, it misses the point that Rule 609 is a limiting factor only as to conviction evidence tending to attack general credibiliy or truthfulness. See, Green v. Wainwright, 634 F.2d 272, 275 (5th Circ. 1981), United States v. Garcia, 531 F.2d 1303, 1306 (5th Cir. 1976).

The legislative history of Rule 609 shows that it was designed to delineate the circumstances under which a witness's truthfulness, in the general sense, may be impeached by the use of the mere fact of a prior conviction. Indeed, the Rule was meant to benefit defendants where a criminal case is involved. (Con. Rep. No. 93-1597, 93d Cong. 2d Sess. 9-10, reprinted in USCS Fed. Rules of Evid., App. 3, pp. 231-232; Cong. Rec. (January 30, 1974) p. H310 (remarks of Rep. Hogan) reprinted in USCS Fed. Rules of Evid., App. 5, pp.354-56); United States v. Johnson, 542 F.2d 230, 234-35 (5th Cir.

4/Love's voir dire indicates that his motive and bias stemmed from a well grounded expectation of leniency, as opposed to the mere "hope" that the government might help him. It was Love's testimony of his "hope" which the District Court allowed before the jury.

1976); United States v. Alvarez-Lopez, 559 F.2d 1155, 1158 9th Cir. 1977). Love was a non-defendant witness and Cannon did not seek to use the pre-1965 convictions to impeach Love's "general" credibility. Under these circumstances, Rule 609 was inapplicable. Alvarez-Lopez, supra at 1158; Green v. Wainwright, supra; United States v. Garcia, supra.

There exists a dichotomy between evidence showing general credibility (e.g., motive, bias, perception, memory) United States v. DeLeon, 498 F.2d 1327 (7th Cir. 1974). However, the Seventh Circuit has never been confronced with the question of whether an accomplice witness's conviction coupled with actual leniency from the government as showing a present "expectation" of leniency and properly testing a specific aspect of credibility can be limited by Rule 609 (a) or (b), since that Rule was intended only as a limitation on inquiries into general credibility or truthfulness. Mills v. Estelle, 552 F.2d 119 (5th Cir. 1977): United States v. Price, 577 F.2d 1356 (9th Cir. 1978) (holding that the defendant, on cross-examination, had the right to explore the full relationship between the witness and law enforcement officials under the confrontation clause).

The 1965, 1971, 1978 and 1980 convictions of the witness, Howard Love, while properly allowed as inquiries into general credibility or truthfulness, failed to contribute to the exposure of Love's knowledge, understanding, experience and expectations as to the sentencing recommendation promised in exchange for his testifying for the government. The four convictions were not offered as to the specific credibility issue, they, in no way, contributed thereto; and taken together with the evidence surrounding the 1948 conviction, the latter conviction, plainly,was not cumulative as to such specific credibility issue.

The Sixth Amendment mandates cross-examination into any motive or incentive a witness may have for falsifying his testimony. United States v. Hall, 653 F.2d 1002, 1008 (5th Cir. 1981). The District Court precluded Cannon's cross-examination into noe of Love's motives for testifying falsely - his understanding and consequent expectation (based on his experience in connection with his 1948 conviction) that the government would grant him leniency in exchange for his testimony. (D. App. pp. 73-80). Additionally, Cannon was precluded from exposing the true magnitude of Love's motive stemming from the totality of the 19 years spent in the penitentiary (as opposed to the seven years revealed to the jury) and the fact of an earlier deal. Because the Sixth Amendment requires that cross-examination into any of a witness's motives must be given the largest possible scope, particularly with regard to the testimony of an accomplice, the District Court's limitations upon Cannon's inquiry into Love's motives for testifying falsely was constitutional error of the first magnitude,requiring reversal regardless of whether Cannon was prejudiced thereby. Hall, supra at 1008; Davis v. Alaska, 415 U.S. 308, 318 (1974).

The petitioner respectfully submits that the Seventh Circuit's failure to address the Sixth Amendment issue as to the District Court's limitation of Love's impeachment suggests that Rule 609 is a sufficient substitution for a defendant's guaranteed right of confrontation in all cases, pitting mere notions of relevancy against the right to fully confront and expose non-defendant witnesses, indeed accomplices, before the jury. Rule 609, in and of itself, was never intended by the legislature to satisfy the defendant's constitutional right to confront the witnesses against him. If such intent existed in the promulgation of the Rule, petitioner respectfully submits that the Rule is unconstitu-

tional, both as applied and on its face.

Under the law, which acknowledges a dichotomy between general and specific credibility, there is no occasion, aside from Rule 403, to pit the Sixth Amendment confrontation clause invoked with inquiries into specific credibility against the possible prejudice to the government. Davis v. Alaska, 415 U.S. 308, 319 (1974); Burr v. Sullivan, 618 F.2d 583, 585 (9th Cir. 1980)

CONCLUSION

Petitioner respectfully prays that this Honorable Court grant his Petition for Writ of Certiorari to consider whether the District Court violated the mandate of the Sixth Amendment in refusing petitioner's confrontation of the government's witness, Howard Love, through use of Rule 609(b).

RESPECTFULLY SUBMITTED

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APPENDIX

United States of America v.
Charles Wilson, et al. No. 81-1870,
(7th Cir. Aug. 19, 1983)..... A

Unites States of America v.
Harry Cannon, Nos. 81-2072 and
81-1508 (7th Cir. Aug. 29, 1983)..... B

Order of denial of Petition
for Rehearing..... C

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 81-1870, 81-1871, 81-1872, 81-1873, 81-1874, 81-1875, 81-1876, 81-1877, and 81-2054

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES W. WILSON, RONALD WILLIAMS, GERALD WINFIELD, WILLIAM BARNETT, JOHN MOSBY, LOUIS WINFIELD, CHARLES R. WILSON, LEVELL WILSON, and KATHERINE MARTIN RHONE,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 80 CR 652—**Charles P. Kocoras**, *Judge.*

ARGUED APRIL 4, 1983—DECIDED AUGUST 19, 1983

Before BAUER, POSNER, *Circuit Judges*, and JAMESON, *Senior District Judge.**

BAUER, *Circuit Judge.* Defendants-appellants bring this appeal to challenge their convictions for various drug-related offenses, and, in the case of Defendant Charles W. Wilson, willful violation of the federal income tax laws.

* The Honorable William J. Jameson, Senior Judge of the United States District Court for the District of Montana, is sitting by designation.

Defendants allege numerous errors on the part of the district court. We find that none of these allegations has merit. Accordingly, the judgments of conviction are affirmed as to all defendants.

I. BACKGROUND

The criminal enterprise involved in this case was an ongoing narcotics business which involved the possession and distribution of heroin and cocaine. A federal grand jury, on October 21, 1980, returned a seven count indictment charging eleven defendants with violations of 21 U.S.C. §§ 841(a)(1), 846, and 848; the indictment also charged a single defendant with violation of 26 U.S.C. § 7203.

Count One of the indictment charged Defendant Charles W. Wilson (C.W.) and Harry Cannon with conducting a continuing criminal enterprise from July 1976 through the date of indictment. The continuing enterprise charged consisted of the operation, in concert with others, of a major narcotics ring. Count One further sought the forfeiture of certain property belonging to C.W. and Cannon; the property was alleged to have been obtained with profits from the narcotics business.

Count Two charged defendants with a conspiracy to possess and distribute heroin and cocaine. Cannon and C.W. were charged with controlling the narcotics enterprise, and with procuring heroin and cocaine for distribution. Five persons, C.W., Ronald Williams (Williams), Gerald Winfield (Gerald), Charles R. Wilson (C.R.), and Howard Love (Love), were charged with the dilution, mixing, and packaging of the narcotics at various locations, including a building owned by C.W. and Katherine Martin Rhone (Rhone) at 1618 South Christiana in Chicago. Williams, Gerald, Love, and Levell Wilson (Levell) were charged as the distributors of narcotics packages to street sellers; the indictment further alleged that these four kept records of, and collected a percentage of the proceeds from, street sales of the narcotics. C.W., Love, Williams, Gerald, Rhone, Louis Winfield (Louis),

C.R., and Levell were charged in Count Two as street sellers of heroin; C.R. and Levell also were charged with cocaine street sales. William Barnett and John Mosby were charged for their role as lookouts for the street sellers. Finally, Count Two charged C.W. and Cannon with collecting the proceeds from the narcotics business and with paying salaries to Williams, Gerald, Love, Barnett, and Mosby for their participation in the enterprise.

Counts Three and Four of the indictment charged Levell with the distribution of specified quantities of cocaine and heroin.

Finally, Counts Five, Six, and Seven charged C.W. with federal income tax law violations for the years 1974, 1975, and 1976.

Howard Love pled guilty to Count Two of the indictment on January 30, 1981. Under the plea agreement, Love agreed to testify on behalf of the government; the government agreed to recommend no specific sentence and to make the extent of Love's cooperation known to the sentencing judge.

A jury trial against the remaining ten defendants began on February 9, 1981. On March 31, 1981, the jury returned a verdict finding nine of the remaining defendants guilty of the offenses charged in the indictment. A mistrial was declared as to Cannon; at a later trial Cannon was also convicted.

In addition to the guilty verdict, the jury ordered the forfeiture of C.W.'s assets as listed in Count One of the indictment.

The district court sentenced the defendants in May of 1981. C.W. was sentenced to thirty years in the custody of the Attorney General on Count One; as to that Count the court also imposed a $100,000.00 fine and ordered forfeiture of C.W.'s assets. On Count Two, C.W. received a concurrent sentence of fifteen years incarceration; an additional fine of $25,000.00 also was imposed. Finally, C.W.

was sentenced to a one-year concurrent sentence on each of Counts Five, Six, and Seven; an additional $10,000.00 fine was imposed for each of these counts as well. The sentences of incarceration for Counts Five through Seven were suspended, and a five-year probation period was imposed to run consecutively to the thirty-year incarceration.

Williams was sentenced to fifteen years incarceration on Count Two. Gerald received a twelve-year sentence on Count Two. Mosby's sentence on Count Two was five years incarceration; Barnett received an eight-year sentence. Louis was sentenced to six years incarceration and a $5,000.00 fine was imposed. C.R. was sentenced to six years incarceration; this sentence was consecutive to a state sentence C.R. was serving. Rhone was sentenced to a three-year period of incarceration on Count Two; additionally, the court imposed a $25,000.00 fine on Rhone.

Levell was sentenced to an eight-year period of incarceration and a $10,000.00 fine on Count Two. As to Counts Three and Four, Levell received a concurrent sentence of eight years on each as well as a $10,000.00 fine. The court also imposed a twenty-year special parole period on Levell with respect to Counts Three and Four.

With the exception of C.W., all defendants were released on bond pending appeal; all filed timely Notices of Appeal. We have jurisdiction of these direct criminal appeals pursuant to 28 U.S.C. § 1291.

II. Issues Presented

Defendants have filed a joint brief on this appeal in which they urge several grounds for reversal of their convictions. First, defendants contend the district court's voir dire of the jury was inadequate in light of extensive, prejudicial pretrial publicity. Second, defendants urge that the trial judge abused his discretion by failing to hold an evidentiary hearing on certain allegations of prosecutorial misconduct. Third, defendants contend that their motions for severance were denied improperly. Fourth, defendants argue that the trial court erred by failing to

hold an evidentiary hearing on an allegation of juror misconduct. Fifth, defendants claim they should have been allowed to use all of Love's prior convictions, dating back more than thirty years, for impeachment. Defendants' final joint claim on appeal is that the district court erred by not ordering grants of immunity to certain defense witnesses who refused to testify.

In addition to their joint appeal, individual briefs were filed by Defendants Mosby, Barnett, and Rhone. Barnett and Rhone argue that the evidence presented at trial was insufficient to support the jury verdicts with respect to them. Mosby also challenges the sufficiency of the evidence to support his conviction. Additionally, Mosby contends that the district court erred in denying his motion for a severance and that the district court erred by excluding certain evidence Mosby sought to introduce.

For reasons set forth below, we find that none of the arguments advanced by the defendants has merit. Accordingly, we affirm their convictions.

III. THE VOIR DIRE WAS ADEQUATE

At the time the indictment was returned in this case, the narcotics ring operated by the defendants was a major source of street sale drugs in Chicago; on a typical day the organization sold over $10,000.00 worth of heroin and cocaine. Thus, the case attracted extensive pretrial media coverage. Defendants now contend that by its failure to question each juror individually about his or her exposure to that publicity, the district court failed to adequately protect defendants' right to an impartial jury.

Where, as here, a jury's impartiality is challenged on the basis of pretrial publicity, the defendants must show that exposure to the publicity caused the actual existence of an opinion in a jury's mind at the time of trial. *Irvin v. Dowd*, 366 U.S. 717, 723 (1960). A mere showing that the jurors were familiar with news articles concerning the narcotics ring cannot establish prejudice because "'[i]t is not required . . . that jurors be totally ignorant of the facts and issues involved,' especially given the presump-

tion of juror impartiality that applies in all cases." *United States v. Kampiles*, 609 F.2d 1233 (7th Cir. 1979), *cert. denied*, 446 U.S. 954 (1980) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1960)).

This circuit has addressed repeatedly the procedures to be used to insure juror impartiality where prejudicial pretrial publicity is brought to the trial court's attention. And, we have consistently rejected the rule proposed by the defendants here that an individual examination of the jurors be conducted in all cases where pretrial publicity is at issue. *United States v. Kampiles*, 609 F.2d 1233 (7th Cir. 1979), *cert. denied*, 446 U.S. 954 (1980); *United States v. Carter*, 602 F.2d 799 (7th Cir.), *cert. denied*, 444 U.S. 967 (1979); *Margoles v. United States*, 407 F.2d 727 (7th Cir.), *cert. denied*, 396 U.S. 833 (1969). We remain unconvinced that individual interrogation is a superior guarantee of impartiality; indeed "[i]t seems equally plausible that the average layman would become inhibited if he were called individually into the chambers of a federal judge as he would in the presence of his peers." *Margoles v. United States*, 407 F.2d 727, 732 (7th Cir. 1969). Thus, we reject defendants' claim that their fair trial rights were violated by the district court's failure to interrogate jurors individually with respect to the pretrial publicity in this case.

Defendants also challenge the district court's failure to conduct individual voir dire with respect to media coverage in the interim between the swearing-in of the jurors on February 9, 1981 and the commencement of the trial two weeks later. This challenge must also fail.

Initially, we note that the trial judge properly admonished the jurors on February 9 to avoid exposure to any publicity concerning the case.

Moreover, when the trial commenced the judge conducted a collective voir dire of the jury to determine whether any juror had been exposed to the interim publicity. The sole juror who responded affirmatively to this inquiry was questioned individually and subsequently

excused. Thus, the trial court followed precisely the procedure set forth by this court in *Margoles*:

> [T]he procedure required by this Circuit where prejudicial publicity is brought to the court's attention during a trial is that the court must ascertain if any jurors who had been exposed to such publicity had read or heard the same. Such jurors who respond affirmatively must then be examined, individually and outside the presence of the other jurors, to determine the effect of the publicity. However, if no juror indicates, *upon inquiry made to the jury collectively*, that he has read or heard any of the publicity in question, the judge is not required to proceed further.

407 F.2d at 735 (emphasis added).

We conclude that the trial court properly used collective voir dire to insure that the jury's impartiality remained untainted despite the pretrial and trial publicity attracted by this case. Accordingly, we reject the defendants' claim that inadequate precautions were taken to protect their right to an impartial jury.

IV. Alleged Prosecutorial Misconduct

During the trial in this case, the defendants alleged certain acts of prosecutorial misconduct; defendants contended that the alleged misconduct required dismissal of the indictment against them, or, at a minimum, an evidentiary hearing. The defendants alleged that the government had leaked information to the press which resulted in prejudicial pretrial publicity; that the government used a body recorder on the cellmate of Defendants C.W. and C.R. to eavesdrop on their conversations; and that the government improperly intimidated witnesses to secure favorable testimony. On this appeal, the defendants urge that the district court's failure to hold an evidentiary hearing with respect to these allegations was an abuse of discretion. We disagree.

With respect to the claim that government attorneys had leaked certain prejudicial information to the press, the district judge found that there was no foundation for

defendants' allegations. This finding was proper in light of representations by the government attorneys that they had not disclosed such information; specific indications in the news articles that no information had been provided by government attorneys; and evidence that although the "leaked" information had been in the government's possession for several months, none of the "leaks" occurred until after the information had been released to defense counsel.

Moreover, dismissal of an indictment for prosecutorial misconduct is warranted only where a substantial right of the defendant has been jeopardized. In this case there was no evidence that pretrial prejudicial publicity, whatever its source, affected any rights of the defendants. Indeed, the sole juror exposed to prejudicial publicity was excused. Accordingly, the district court acted properly both in denying an evidentiary hearing on the source of the prejudicial publicity and in refusing to dismiss the indictment.

Similarly, the district court properly exercised its discretion with respect to the tape recording of conversations in the cell of C.W. and C.R. None of the conversations so intercepted were ever admitted into evidence, and the prosecuting attorneys denied having been exposed to the recordings. Furthermore, the trial court reviewed the tape recordings *in camera* before denying the defendants' request for an evidentiary hearing. On the basis of that review, the trial judge found that the tapes were connected to the investigation of a crime separate from those charged in the indictment. The district court therefore concluded that defendants' rights in the case at trial had not been affected by the recording incident. We believe that the district court's *in camera* review of the tape recordings, under the circumstances presented here, adequately safeguarded the defendants' interests.[1]

[1] Defendants reliance on *United States v. Disston*, 582 F.2d 1108 (7th Cir. 1978), is misplaced. Disston stood trial with a co-defendant, Camp, who was a government informer. The

(Footnote continued on following page)

Accordingly, we reject defendants' contention that the failure to hold an evidentiary hearing was an abuse of discretion.

Finally, defendants challenge the district court's refusal to grant an evidentiary hearing with respect to allegations of witness intimidation.

The defendants' motion to dismiss the indictment on the basis of the prosecution's intimidation of potential witnesses alleged a panoply of acts by the government to secure favorable testimony. None of these allegations, however, contained sufficient facts to provide the basis for a meaningful evidentiary hearing. The government responded with a general denial.

The trial judge refused defendants' motion for dismissal of the indictment on the basis that the bare allegations of defense counsel were not sufficient to warrant granting the motion. We note, however, that the trial judge invited defense counsel to introduce the factual grounds for specific allegations of prosecutorial misconduct.

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[1] *continued*
government never disclosed Camp's informer status, and maintained throughout the trial that it had no electronic recordings of conversations to which Camp was a party. Disston sought post-trial relief based on the then newly discovered evidence that Camp was an informer who may have provided prejudicial information regarding Disston or Disston's trial strategy to the government. This court held that under those circumstances an evidentiary hearing was necessary to determine whether Disston's conviction should be reversed.

By contrast, the case before us involved a disclosed tape recording which was reviewed *in camera* by the trial court. The trial court found that the recording contained nothing prejudicial to defendants' rights in this case. This *in camera* proceeding was sufficient to safeguard defendants' interests. *See also United States v. Disston*, 582 F.2d 1108, 1111 n.9 (7th Cir. 1978) (limiting the evidentiary hearing requirement to cases where the trial judge has determined that electronically recorded conversations should be turned over to the defendant).

Moreover, the trial court did not reject out-of-hand the possibility of an evidentiary hearing on such specific allegations. Instead, the court requested more specific allegations, and remarked, "[i]f there needs to be a determination on a case-by-case basis, then we are going to have to get into that . . . with the procedure I suggested that *if there is not a hearing*, at least I may well require the Government to respond in like kind . . . ." Tr. 62-63 (emphasis added).

If there was a factual basis for defendants' allegations of prosecutorial misconduct, that factual basis should have been presented to the trial court. The defendants were afforded an opportunity to present allegations sufficient to warrant an evidentiary hearing. It is no basis for relief on appeal that defendants failed to avail themselves of that opportunity.

Under these circumstances, we believe the district court properly refused to dismiss the indictment. And, to whatever extent the district court may be said to have "refused" an evidentiary hearing on these bare allegations of prosecutorial misconduct, we hold that such action was a proper exercise of judicial discretion.

V. Motions For Severance

Defendants next claim that the district court erred in denying various motions for severance. These motions included a motion to sever Counts Five through Seven of the indictment (the income tax charges) from Counts One through Four (the drug-related charges) as well as the motions of individual conspirators for separate trials on the basis of prejudicial pretrial publicity. A trial court's decision not to grant a motion for severance will be reversed only upon a showing of abuse of discretion. *See, e.g., United States v. Thomas*, 676 F.2d 239 (7th Cir. 1982); *United States v. West*, 670 F.2d 675 (7th Cir. 1982); *United States v. Tanner*, 471 F.2d 128 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972). Defendants have failed to make such a showing in this case.

A. The Joinder of the Offenses

Federal Rule of Criminal Procedure 8(a) allows the joinder of two or more offenses in the same indictment.[2] The defendant seeking severance under Rule 14, Federal Rules of Criminal Procedure, then bears the burden of showing that the joinder is prejudicial; this requires more than a mere showing that severance might have made acquittal more likely. *United States v. Thomas*, 676 F.2d 239 (7th Cir. 1982).

In this case, defendants argue first that the joinder of Counts Five through Seven with the narcotics charges violated the dictates of Rule 8(a). We disagree. Joinder of offenses is a means of avoiding expensive, duplicative trials. *United States v. Mardian*, 546 F.2d 973 (D.C. Cir. 1976). Thus, joinder under Rule 8 is favored where there are common elements of proof in the joined offenses, and where the interest of judicial economy outweighs any prejudice to the defendants. *Id.* at 979.

Count One of the indictment charged defendants C.W. and Cannon with participation in a continuing criminal enterprise, in violation of 21 U.S.C. § 848, from 1976 through 1980. In order to sustain a conviction under section 848, the government must prove that the defendant received "substantial income" from the criminal enterprise. 21 U.S.C. § 848(b)(2)(B).

Counts Five through Seven charged Defendant C.W. with failure to file federal income tax returns to report his income for the years of 1974, 1975, and 1976. The in-

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[2] The rule provides that:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

FED. R. CRIM. P. 8(a).

dictment further charged that C.W. received income during those years of $11,700.00, $22,400.00, and $47,582.00 respectively.

Thus, the issue under Rule 8 is whether common elements of proof supported the joinder of these offenses. The elements of proof for failure to file an income tax return include that the defendant had sufficient income that filing was necessary, and that the defendant failed to file a return. Proof of a continuing criminal enterprise requires evidence of substantial income therefrom. Clearly these offenses involved the introduction of common proofs.

Evidence of large expenditures tended to show that C.W. had sufficient income to necessitate filing of a tax return. Evidence that he failed to file such a return led to the permissible inference that he had no bona fide income source to support these expenditures. *See United States v. Hinton*, 543 F.2d 1002 (2d Cir. 1976). Given the high degree of relatedness between these proofs, we hold that joinder under Rule 8 was not improper as a matter of law.[3]

Where joinder of offenses is proper under Rule 8, a motion for severance under Rule 14 will be granted only where defendants are able to show that joinder is prejudicial. Defendants have failed to make that showing with respect to the offenses joined here.

B. Joinder of Defendants

No claim is made here that defendants were misjoined under Federal Rule of Criminal Procedure 8(b) as a matter of law. The issue before us is merely whether the

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[3] Defendants make much of the fact that the income tax charges included two years preceding the charged dates of the continuing criminal enterprise. Under the circumstances, we find this fact insignificant. First, there was a clear connection between the 1976 tax law violation and the continuing criminal enterprise. Second, evidence was introduced in connection with the narcotics charges showing that the criminal enterprise was in existence during 1974 and 1975. Accordingly, the common elements of proof standard was satisfied as to all counts of the indictment.

trial court abused its discretion in refusing to grant Rule 14 motions for severance.

Defendants allege that joinder prejudiced them in two regards. First, defendants claim that the establishment of C.W.'s financial status involved the introduction of proof which impermissibly allowed the jury to infer that all of the defendants gained substantial income from their criminal activities. Second, defendants claim that the prejudicial pretrial publicity warranted severance.

Both of these claims lack merit. Evidence of the income received by defendants from their criminal activities would have been introduced in any event to prove their participation in a continuing criminal enterprise. And, any potential prejudice from the extensive pretrial publicity in this case was avoided by the trial court's voir dire of the jury. Accordingly, we hold that the district court did not abuse its discretion by failing to grant defendants' motions for severance.

VI. Allegation Of Juror Misconduct

Defendants next contend that the district court committed reversible error by failing to hold an evidentiary hearing concerning the defendants' allegation that a government witness had spoken with one of the jurors. This contention is without merit.

The defendants alleged that Catherine Ferguson, a prosecution witness, communicated with Juror Figurski during a sidebar. On the basis of this allegation, counsel for one of the defendants moved for a mistrial. The district court denied this motion.

The denial of the motion for mistrial, however, did not come until after the district court had questioned Ferguson outside of the jury's presence; Ferguson denied that she had been talking with the juror, she explained that she had merely been mumbling to herself. Ferguson's explanation was corroborated by the court reporter. Defense counsel then were allowed to voir dire two of the defendants concerning their observation of Ferguson's conduct.

We believe that the trial judge conducted the necessary investigation into the allegation of juror misconduct. The trial judge's determination that there had been no communication between Ferguson and Figurski was supported adequately by the testimony of Ferguson and the court reporter. Thus, it was not necessary to question Figurski.

Because the trial court properly found there had been no private communication between witness and juror, the cases cited by defendants to support the need for an evidentiary hearing are inapt. It is true, as defendants argue, that private communications between jurors and others are presumptively prejudicial. There can be no prejudice, however, in the absence of any such communication. Accordingly, we hold that the procedure followed by the district court in investigating the allegation of juror misconduct in this case was proper; defendants' claim of reversible error must fail.

VII. Love's Prior Convictions

The principal government witness in this case was Howard Love. Love was the sole conspirator to enter a guilty plea; in exchange for the plea the prosecution agreed to make no specific sentencing recommendation and to make the extent of Love's cooperation known to the sentencing judge. Because of the importance to the prosecution of Love's testimony, impeaching Love's credibility was of critical importance to the defendants. Thus, defendants sought to introduce all of Love's prior convictions; the first conviction dating back to 1948. The district court, however, disallowed introduction of Love's pre-1965 convictions.[4] Defendants now contend that the trial court erred by excluding evidence of these convictions and that the trial court failed to explain adequately the basis for its ruling. Neither of these contentions had merit.

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[4] Love's pre-1965 convictions consisted of: (1) a military conviction for larceny in 1948; (2) a 1953 conviction for armed robbery; and (3) a 1958 conviction for three armed robberies.

Federal Rule of Evidence 609 defines when a party may use a prior conviction in order to impeach a witness. Under that rule

> [e]vidence of a conviction . . . *is not admissible if a period of more than ten years has elapsed* since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, *unless the court determines*, in the interests of justice, *that the probative value of the conviction* supported by specific facts and circumstances *substantially outweighs its prejudicial effect.*

FED. R. EVID. 609(b) (emphasis added). Thus, Love's pre-1965 convictions were inadmissible in the absence of a finding by the district court that their probative value outweighed their prejudicial effect.[5]

The district court properly found that the interests of justice in this case did not require admission of Love's stale convictions. As noted by the trial judge, evidence of Love's four convictions in 1965, 1971, 1978, and 1980 was sufficient to provide a record basis for defendants' argument that Love had a motive for testifying for the government. We agree with the district court that evidence of Love's earlier convictions would have been cumulative, and thus could not give rise to a claim of exceptional circumstances warranting their admission.

VIII. DEFENSE WITNESS IMMUNITY

We summarily reject defendants' claim that their compulsory process rights under the sixth amendment were violated by the court's failure to order the conferral of use immunity on certain defense witnesses. The trial judge lacks authority to request immunity. *United States v. Frans*, 697 F.2d 188, 191 (7th Cir. 1983). That power be-

[5] The September 1970 release date for confinement imposed on Love's 1965 conviction brought it closer to the parameters of the ten-year rule. Accordingly, the district court exercised its discretion to allow use of this conviction for impeachment.

longs exclusively to the executive branch. 18 U.S.C. § 6003 (1970). And, we will not review a prosecutor's immunization decisions in the absence of substantial evidence showing that the prosecutor's actions amounted to a clear abuse of discretion violating the due process clause. *United States v. Frans*, 697 F.2d at 191; *accord In re Perlin*, 589 F.2d 260, 269 (7th Cir. 1978). Defendants have made no such showing here. Thus, we hold that the district court properly denied defendants' request to order use immunity for certain witnesses, and that there was no abuse of discretion in the government's decision not to confer immunity.

IX. MOSBY'S EVIDENTIARY CLAIM

Defendant Mosby sought to introduce certain evidence in his defense by stipulation. This evidence involved proof of Mosby's heart condition and his concomitant inability to hold a regular job. The district court deemed this evidence irrelevant and denied its admission. Mosby now contends that the district court's refusal to admit this evidence constituted an abuse of discretion.

Mosby contends that this evidence was relevant because if Mosby had testified at trial the evidence could have been used to "humanize" him to the jury. Br. for Appellant Mosby at 15. It is true that the evidence of Mosby's personal background would have been admissible if Mosby had taken the stand in his own behalf, but he did not testify. Thus, defendant is seeking to accomplish indirectly what he cannot do directly—to present evidence favorable to himself without subjecting himself to the possible dangers of cross-examination. *Cf. United States v. Lyon*, 397 F.2d 505 (7th Cir.), *cert. denied*, 393 U.S. 846 (1968) (witness cannot invoke the privilege against self-incrimination on cross-examination as to matters testified to on direct).

The district court acted within its discretion when it refused to admit the personal background evidence offered by way of stipulation. Mosby's claim of error is therefore rejected.

X. Sufficiency Of The Evidence

Defendants Rhone, Mosby, and Barnett all urge that the evidence presented in this case was not sufficient to support their convictions. Barnett, in particular, argues that this conviction must be reversed because it is based on "inconsistent testimony, given by admitted coconspirators, perjurers, and informants." Br. for Appellant Barnett at iv.

Our task is not to weigh the evidence or to assess the credibility of the witnesses. The verdict of the jury must be sustained if there was substantial evidence, viewed in the light most favorable to the government, to support it. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Frans*, 697 F.2d 188, 190 (7th Cir. 1983).

We have examined the record in this case, and find that each of the defendants stands convicted on the basis of substantial evidence. Accordingly, we decline to disturb the jury verdict and the judgment entered thereon.

XI.

Having examined each of the arguments raised by defendants on this appeal we find none to have merit. Thus, for the reasons set forth above, defendants' convictions are

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 81-2072 and 81-2508

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HARRY CANNON,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 80 CR 652—**Charles P. Kocoras**, *Judge.*

ARGUED APRIL 4, 1983—DECIDED AUGUST 29, 1983

Before BAUER, POSNER, *Circuit Judges*, and JAMESON, *Senior District Judge.**

BAUER, *Circuit Judge.* Defendant-appellant, Harry Cannon (Cannon) was convicted of narcotics-related offenses following a jury trial in the United States District Court for the Northern District of Illinois. On this direct appeal Cannon challenges both the district court's jurisdiction over his trial and the judgment of conviction in

* The Honorable William J. Jameson, Senior Judge for the United States District Court for the District of Montana, sitting by designation.

which that trial culminated.[1] We hold that the district court did have jurisdiction in this case. Additionally, we hold that Cannon has failed to present any meritorious challenge to the trial proceedings. Accordingly, we affirm Cannon's conviction.

I

Cannon was one of eleven persons charged by a federal grand jury, on October 21, 1980, with violations of 21 U.S.C. §§ 841(a)(1), 846, and 848.[2] Cannon was named in two counts of the seven-count indictment. Count One charged Cannon and Charles W. Wilson (C.W.) with conducting a continuing criminal enterprise. The enterprise was described in the indictment as a narcotics business which involved possession and distribution of heroin and cocaine. Count One also sought recovery of the ill-gotten gains of this criminal venture through forfeiture of automobiles and real estate belonging to C.W. and Cannon.

Count Two charged Cannon and the other ten defendants with conspiracy in relation to this narcotics business. The indictment described the structure of this conspiracy; Cannon and C.W. were charged with controlling the business by procuring the drugs, establishing and maintaining distribution and record-keeping procedures, and distributing the business' proceeds to its "salaried" employees.

On January 30, 1981, one of the other defendants, Howard Love (Love), entered a plea of guilty to Count Two of the indictment. Under the term of Love's plea agreement, Love agreed to testify for the government

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[1] Cannon's appeal on jurisdictional grounds, Appeal No. 81-2072, was consolidated by this court with the appeal from his conviction, Appeal No. 81-2508, on September 28, 1981.

[2] The indictment also charged one of the defendants, Charles W. Wilson, with willful failure to file federal income tax returns for 1974, 1975, and 1976. That charge has no relevance in the context of Cannon's appeal.

against the remaining ten defendants. In exchange, the government agreed to make no specific recommendation as to Love's sentence and to make the extent of Love's cooperation known to the sentencing judge.

The remaining ten defendants, including Cannon, pled not guilty; the case against them was tried to a jury during February and March of 1981. At the close of that trial, on March 31, 1981, the jury returned guilty verdicts with respect to nine of the ten defendants.[3] The jury, however, could not agree on a verdict with respect to the charges against Cannon. The trial judge accordingly declared a mistrial as to Cannon.

On May 28, 1981, Cannon filed a motion to dismiss the indictment against him; the motion urged that the fifth amendment double jeopardy provision[4] barred a retrial of the case against Cannon. The trial court denied Cannon's motion on July 6, 1981. Also on July 6, Cannon filed a Notice of Interlocutory Appeal from the district court's denial of his double jeopardy motion.

Cannon's second jury trial began that same day. The jury verdict, returned on July 14, 1981, found Cannon guilty as charged; nonetheless, the jury declined to order forfeiture of Cannon's property as listed in Count One.

The trial court subsequently sentenced Cannon to a twenty-year period of incarceration on Count One, and a concurrent term of fifteen years for Count Two. Consecutive fines of $25,000 were imposed on each count. Thus, Cannon was sentenced to a total period of incarceration of twenty years and was fined a total of $50,000. Sentence was stayed pending this appeal; our jurisdiction is based on 28 U.S.C. § 1291.

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[3] The convictions of these nine defendants subsequently were appealed and have been affirmed by this court. *See United States v. Wilson*, No. 81-1870, et al. (7th Cir. Aug. 19, 1983).

[4] "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

II

Cannon raises five arguments for consideration on appeal. First, Cannon asserts that the district court improperly admitted Cannon's post-arrest statements into evidence in violation of his fifth and sixth amendment rights. Second, Cannon contends that the district court improperly limited his attempt to impeach the credibility of the chief prosecution witness. Cannon's third claim is that the district court committed reversible error by allowing the prosecution to elicit certain testimony during its cross-examination of C.W. Wilson. Cannon next contends that his conviction must be vacated because the district court lacked jurisdiction to retry him during the pendency of his double jeopardy appeal. Finally, Cannon asserts that his right to a fair trial was derogated by the district court's refusal to order the prosecution to immunize a defense witness.

III

We turn first to Cannon's claim that the district court lacked jurisdiction to proceed with his retrial. This claim, if successful, would be dispositive of Cannon's appeal and would obviate any need to consider the trial errors alleged by Cannon.

Cannon, citing *Abney v. United States*, 431 U.S. 651 (1977), asserts that the "denial of a pre-trial Motion to Dismiss on double jeopardy grounds is a final order within 28 U.S.C. Sec. 1291 and is, therefore, immediately appealable." Br. of Appellant at 48. On that basis, Cannon argues that the mere filing of his Notice of Appeal stripped the district court of jurisdiction over Cannon's retrial. We disagree.

The *Abney* Court stressed that a motion to dismiss on double jeopardy grounds justifies a departure from the normal rule of finality only because the full protection of the double jeopardy clause cannot be achieved unless the criminal defendant is protected from exposure to a second trial. 471 U.S. at 662-63. Thus, while the court of appeals may exercise jurisdiction over an appeal from a pretrial

refusal to dismiss an indictment on double jeopardy grounds, other claims presented to, and rejected by, the trial court acting on the motion to dismiss are not subject to immediate appeal unless such claims fall within some other collateral-order exception to the final judgment rule. "Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence." *Id.* at 663.

In the case before us, Cannon styled his motion as a motion to dismiss on double jeopardy grounds. That motion, however, was based on allegations of prosecutorial misconduct; Cannon alleged that such misconduct had deprived him of a fair trial and led to the jury's inability to reach a verdict. For that reason Cannon urged that a second trial would abrogate his right to be free from double jeopardy.

We believe that Cannon's motion, whatever he chose to title it, was an attempt to interpose his due process claim to bar retrial. That attempt must fail. The denial of a motion to dismiss an indictment on the basis of prosecutorial misconduct is neither a final appealable order nor a proper subject for interlocutory appeal. *United States v. Rosario*, 677 F.2d 614 (7th Cir. 1982); *United States v. Rey*, 641 F.2d 222 (5th Cir. 1981).

We must next decide whether Cannon's mere filing of a Notice of Appeal, albeit from a nonappealable order, was sufficient to divest the district court of jurisdiction over his retrial. The general rule is that an appeal suspends the district court's power to proceed further in a cause. This rule, however, has no application where there is a purported appeal from a nonappealable order. *United States v. Bastanipour*, 697 F.2d 170, 173 (7th Cir. 1982). Thus, where a defendant's motion to dismiss on double jeopardy grounds is frivolous or fails to raise a colorable claim of double jeopardy, the mere filing of a Notice of Appeal is insufficient to divest the district court of jurisdiction. *United States v. Dunbar*, 611 F.2d 985 (5th Cir.) (en

banc), *cert. denied*, 447 U.S. 926 (1980). Rather, we agree with the Third Circuit that

> "an appeal from the denial of a double jeopardy motion does not divest the distict court of jurisdiction to proceed with trial, if the district court has found the motion to be frivolous . . . . [B]oth the district court and court of appeals shall have jurisdiction to proceed. Thus the defendant is entitled ultimately to appellate review."

United States v. McQuilkin, 673 F.2d 681, 687 (3d Cir. 1982) (*quoting United States v. Leppo*, 634 F.2d 101, 105 (3d Cir. 1981)).

In this case the district court properly found Cannon's motion to dismiss the indictment frivolous because the allegations of prosecutorial misconduct on which it was based had been twice considered and rejected by the trial judge.[5] Moreover, we note that the substantive allegations of prosecutorial misconduct contained in Cannon's motion have been considered and rejected by this court. *See United States v. Wilson*, No. 81-1870, et al., slip op. at 7-10 (7th Cir. Aug. 19, 1983). Accordingly, we hold that the district court acted properly in proceeding with Cannon's retrial.[6]

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[5] *See generally* United States v. Wilson, No. 81-1870, et al., slip op. at 7-10 (7th Cir. Aug. 19, 1983).

[6] We note that this court's order of September 28, 1981, joined the question of whether Cannon's "double jeopardy" appeal had been mooted by his retrial with the merits of his claim. Generally, an appeal is dismissed as moot when events subsequent to the filing of that appeal preclude the appellate court from granting effective relief. This is not such a case. Had we found merit in Cannon's "double jeopardy" claim, relief could have been granted in the form of a vacation of his conviction; moreover, the indictment could have been quashed. Accordingly, we hold that until an appeal from a defendant's conviction has been finally determined, the appeal from a denial of a double jeopardy motion is not moot. *See United States v. Leppo*, 641 F.2d 149, 151 n.3 (3d Cir. 1981).

IV

We next consider Cannon's argument that the district court erred by admitting Cannon's post-arrest statements into evidence. Cannon argues first that the district court's factual findings that his fifth amendment right to counsel had not been violated were insufficient. Second, Cannon asserts that the district court failed to give adequate independent consideration to Cannon's claim that his sixth amendment right to counsel had been violated. Both of these assertions are meritless.

Cannon was arrested at his home on October 27, 1981. One of the arresting officers read Cannon his rights from a pre-printed card. Cannon indicated that he understood his rights and was willing to talk to the police. Later, when the officers were transporting Cannon to the offices of the Drug Enforcement Agency, one of the officers offered Cannon a copy of the indictment and told Cannon that the indictment was the basis for his arrest. A conversation between Cannon and the officers ensued during which Cannon made certain incriminating statements.

At both the first and second trials, Cannon sought to suppress these statements. He argued first that the government had failed to establish that Cannon had knowingly waived his *Miranda* rights—a fifth amendment violation—and, second, that Cannon's sixth amendment right to counsel had been violated because the officers engaged him in conversation without notice to counsel.

The district court denied Cannon's motion to suppress; it found that Cannon had been given the *Miranda* warnings and had acknowledged his understanding of them before making any statement. The district court also found that Cannon had not been interrogated except as to whether he wanted a copy of the indictment, and that Cannon's statements in the car therefore constituted a voluntary waiver of his rights.

These factual findings, which were supported by substantial evidence, provided an adequate basis for the dis-

trict court's conclusion that Cannon's fifth amendment rights had not been violated.

Cannon argues, however, that even if there was no fifth amendment violation, his statements should have been suppressed because his sixth amendment right to counsel was violated. On appeal, Cannon further asserts that the district court erred by not giving adequate, independent consideration to his sixth amendment claim.

We believe that the district court's factual findings and conclusions sufficiently addressed Cannon's concerns under both amendments. The sixth amendment protects a defendant who has expressed a desire for counsel from the deliberate elicitation of statements in the absence of such counsel. *See Massiah v. United States*, 377 U.S. 201 (1964). Thus, while it is true, as Cannon asserts, that the district court made no express factual finding as to whether Cannon had requested counsel, we do not find this dispositive under the circumstances of this case. The district court did expressly find that no statements had been deliberately elicited from Cannon. Accordingly, it was not error for the district court to conclude that there had been no sixth amendment violation, and that Cannon's post-arrest statements were admissible.

V

Cannon also claims that the district court committed reversible error by allowing the prosecution to elicit certain testimony during its cross-examination of C.W. Wilson. The trial court, of course, is afforded considerable latitude in its control of cross-examination; that court's evidentiary rulings will not be disturbed on appeal unless there is a clear showing of abuse of discretion. *United States v. West*, 670 F.2d 675 (7th Cir. 1982). No such abuse was shown in this case.

The prosecution cross-examined C.W. Wilson about his involvement in the narcotics business. Cannon's specific complaint is that the government questioned Wilson improperly about items which the trial court had previously

suppressed as improperly seized.[7] Cannon also asserts error in the government's questioning of Wilson with regard to his conviction for offenses arising out of the same indictment as Cannon had been charged under.

As to the questions concerning Wilson's conviction, we need look no further than defense counsel's own elicitation of testimony from Wilson. On direct examination defense counsel established that Wilson had been named in the same indictment as Cannon. Thus, the government's cross-examination in this matter, which went to clarifying Wilson's status as a codefendant, were properly limited to a subject matter raised on direct. Moreover, defense counsel made no contemporaneous objection to this line of questioning. Under these circumstances, we find Cannon's assertion of error to be totally without merit.

Similarly, we find no merit in Cannon's contention that Wilson was improperly questioned about evidence suppressed by the court. On direct examination defense counsel elicited testimony from Wilson implying that only gambling activities occurred at 1618 South Christiana, and that Cannon therefore had no involvement in the narcotics business. Given Wilson's testimony on direct examination, the government was entitled, in cross-examining Wilson, to inquire generally into large sums of money and quantities of narcotics kept at the Christiana address. Moreover, the government's questions were properly limited to refuting the inference that gambling was Cannon's sole link to Wilson.

For the foregoing reasons we find that the government's cross-examination of Wilson was not improper. Accordingly, the district court did not absue its discretion by permitting that questioning.

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[7] The items were photographs of 850 bags of narcotics seized in a raid at 1618 South Christiana and $55,000 in cash seized from Wilson.

VI

Cannon's final arguments concern the district court's refusal to allow impeachment of government-witness Howard Love through admission of Love's pre-1965 convictions, and the district court's refusal to order the government to confer immunity on a certain defense witness who asserted testimonial privilege. These same claims were raised, considered, and rejected in *United States v. Wilson*, No. 81-1870 et al., slip op. at 15-16 (7th Cir. Aug. 19, 1983). For the reasons stated in *Wilson*, we reject Cannon's claims as meritless.

We have examined each of Cannon's arguments and find that none has merit. Accordingly, the judgment of conviction entered by the district court in Cannon's cause is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 26, 1983.

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. WILLIAM J. JAMESON, Senior District Judge*/

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. HARRY CANNON, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 80 CR 652 Charles P. Kocoras, Judge.
Nos. 81-2072 & 81-2508	

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Defendant-Appellant Harry Cannon, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*/ The Honorable William J. Jameson, Senior Judge of the United States District Court for the District of Montana, is sitting by designation.